In The

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1528

JOHN E. SCALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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John E. Scales, the petitioner herein, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in Case Number 78-5322 decided and filed on March 8, 1979.

OPINIONS OF THE COURTS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit in Case Number 78-5322, United States of America, Plaintiff-Appellee, v. John E. Scales, Defendant-Appellant, is attached and appears as Appendix "A." The judgment and probation/commitment order of the United States District Court for the Southern District of Ohio, Eastern Division, is likewise attached and appears as Appendix "B." Neither of these decisions is officially reported.

JURISDICTION

Jurisdiction is invoked in accordance with the provisions of 28 U.S.C. 1254:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Jurisdiction is also sought to be invoked in accordance with the provisions of Rule 19 of the Rules of the Supreme Court of the United States Subsection (b) because of conflict in decisions in such cases and as well to invoke the Court's powers of supervision in regard to certain procedural matters.

QUESTIONS FOR REVIEW

1. Is prejudicial error committed in a criminal case in the federal courts upon the admission *into evidence* of chart summaries which summarize the indictment and state conclusions as to what is not in evidence where such chart summaries are not prepared by an expert, when the charts summarize documents already in evidence?

2. Is prejudicial error, if any, corrected if after the trial court admits in evidence a summary of the indictment, the jury is instructed the indictment is not evidence and the summaries are not evidence but are admitted only to assist the jury in considering the evidence?

3. Is it prejudicial error for a trial court in the presence of the jury to interrupt cross-examination upon a relevant matter and openly invite an objection from the government?

STATUTORY PROVISIONS

1. Title 29, United States Code, Section 501(c), reads as follows:

> "(c) Embezzlement of assets; penalty. Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

2. Title 18, United States Code, Sections 2, 371 and 664, reads in pertinent part as follows:

Section 2.

> "Principals. — (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 371.

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Section 664.

> "Theft or embezzlement from employee benefit plan.— Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the

use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of Title I of the Employee Retirement Income Security Act of 1974."

STATEMENT OF THE CASE

On March 8, 1979, the United States Court of Appeals for the Sixth Circuit affirmed the convictions of John E. Scales on nine counts of unlawfully converting to his own use assets of Local 423 of the Laborers' International Union in violation of 18 U.S.C. 371. On May 31, 1978, the date of the above convictions, the jury acquitted Scales on six counts, which included three charges under Section 501(C), two charges for conversion of funds from an employee insurance fund in violation of 18 U.S.C. 664 and one charge of mail fraud in violation of 18 U.S.C. 1341. Scales was sentenced to a total of ten years.

At trial, with respect to the charges under 29 U.S.C. 501 (C), Scales admitted that he, following procedure and custom of long standing before his tenure as business manager of Local 423 from 1968 through 1977, received per diem expenses from more than one entity, to wit; Local 423, the International and the Laborers' District Council. He made no accounting for such funds but paid income tax thereon.

The defense contention throughout the trial was that the practice of per diem allowances without submission of itemized expense statements was a matter of custom and long standing in Local 423 and other local unions. The corroboration of this practice tended to support Scales defense of lack of intent, since he admitted the receipts and expenditures.

The government called Thomas Needham, comptroller of the Laborers' International Union and while on cross-examination, the following took place:

"BY THE COURT:

Q. Mr. Needham, in your capacity as comptroller for the International, do you ever pass on the questions of the reasonableness of the amount of expense that a local may authorize in addition to the $60 a day?

A. No, Your Honor, I don't.

BY MR. WONNELL:

Q. Are you familiar with the procedure in some locals of giving a per diem without submission of an expense voucher or an expense account?

THE COURT: I am going to sustain an objection to that.

MR. PALMER: The Government does so object, Your Honor.

THE COURT: I will sustain the objection to that."

One hundred sixty-one government exhibits including thousands of pieces of paper, almost all of which were stipulated as business records, were admitted in evidence. Contention arises because of the admission of government exhibit 145 (a copy of which, reduced considerably in size, has been lodged with the Court), consisting of twenty-five huge charts purporting to summarize the evidence. The first of these charts summarizes the indictment and over objection was admitted into evidence.

The charts were prepared by a special agent of the FBI who testified that he is not an expert and that he and others prepared the charts after reviewing business records. The trial court, over objection, admitted exhibit 145 into evidence

but told the jury in its instructions the indictment is not evidence, the charts are not evidence but are only to serve in your deliberations to assist in considerations regarding the evidence.

On March 21, 1979, a letter was directed by counsel for petitioner to the Clerk of the United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio, in accordance with Rule 21(1) of the Rules of the United States Supreme Court, requesting that the Clerk certify all of the record in the Court's possession in Case No. 78-5322, United States of America v. John E. Scales, to the United States Supreme Court on or before April 6, 1979.

ARGUMENT

1. Indictment As Evidence

It is prejudicial error to admit into evidence a summary of the indictment and an instruction by the trial court that the indictment is not evidence does not cure or correct such error but is inconsistent and potentially misleading to a jury.

It has long been the practice in the trial court to send a copy of the indictment to the jury with a proper instruction that the indictment is not evidence nor is it to be considered as evidence. That was done in the instant case without objection. This practice has been approved in *Garner* v. *United States,* 244 F2d 575 (6th Cir. 1957), *cert. denied,* 355 U.S. 832. The trial court; however, because of a considerable body of cases involving charts and summaries and Rule 1006 of the Federal Rules of Evidence as follows:

> "Rule 1006. Summaries
>
> The contents of voluminous writing, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The judge may order that they be produced in court."

was led into error, in effect, admitting the indictment (that is, a summary thereof) into evidence.

It is clear that Rule 1006 does not provide for such a procedure nor does it provide for summaries when all documents relied upon are marked and admitted as in the instant case. No case cited by the government or, with all due respect, in the opinion of the United States Court of Appeals for the Sixth Circuit condones or passes upon in any way the admission into evidence of a summary of a criminal indictment under any circumstance.

Certainly this is a matter subject to review in accordance with the provisions of 28 U.S.C. 1254. Moreover, if such a procedure is to be condemned, it is urged that such is well within the meaning and intent of the power of supervision embodied in Rule 19 of the Rules of the United States Supreme Court.

2. Confusion As To Use Of Summaries As Evidence

In *Steele* v. *United States,* 222 F2d 628 (5th Cir. 1955) cert. denied, 355 U.S. 828 (1957) rehearing denied, 355 U.S. 875, an income tax evasion case, it was held to be prejudicial error to send to the jury (not admitted in evidence) government exhibits which were based on computations made by a government witness; the court noting that a jury could scarcely consider them.

While in the prosecution of a conspiracy to violate the Dyer Act, (interstate transportation of a stolen motor vehicle), it was held error to permit an FBI agent to exhibit charts in rebuttal to destroy the defendant's claim he was an unwitting "tool," the error was not considered prejudicial as the charts were not offered as competent evidence. *Elder*

v. *United States,* 213 F2d 876 (5th Cir. 1954), cert. denied 348 U.S. 901, rehearing denied 348 U.S. 922 (1955).

In the court from which relief is sought in *United States* v. *Moody,* 339 F2d 161 (6th Cir. 1964) cert. denied 386 U.S. 1003 (1967), a case involving the net worth approach regarding income tax evasion, it was held that charts presented by an expert not based upon facts appearing in the record are inadmissible.

A succinct statement of a problem to be encountered in the use of summaries even under Rule 1006 is found in the fifth syllabus of *United States* v. *Smyth,* 556 F2d 1179 at 1180 (5th Cir. 1977), rehearing en banc denied, 557 F2d 823, cert. denied, 434 U.S. 862:

> "Inasmuch as summaries are elevated under rule of evidence to the position of evidence, care must be taken to omit argumentative matters in their preparation lest the jury believe that such matter is itself evidence of the assertion it makes. Federal Rules of Evidence, Rule 1006, 28 U.S.C.A."

In a long line of cases, summarized by citation only in the opinion, at page 8, of the court below, beginning with *Gariepy* v. *United States,* 189 F2d 459 (6th Cir. 1951), and ending with *United States* v. *Lawhon,* 499 F2d 352 (5th Cir. 1974), rehearing en banc denied, 502 F2d 1168, cert. denied, 419 U.S. 1121 (1975), courts have permitted the use of summaries. Almost all of these cases were income tax evasion cases and all of them involved voluminous records not introduced in evidence. In some the summaries were admitted in evidence while in others the summaries were only used in jury presentation. In all cases where they were used as evidence, as in the instant case, the in court presentation as well as the preparation was by expert witnesses. Such is not the case in the trial of the petitioner. The only witness who testified regarding exhibit 145 described himself as a "layman."

This is the first instance known to counsel where one who describes himself as a "layman" and not an expert has admitted preparation of summaries and is then permitted to testify in narrative closing argument style, sans questions and answers, over repeated objections. The trial court finally, after additional objections, stopped the testimony in this fashion. This was done only after the summary of the indictment, later admitted as part of exhibit 145, was again summarized by a "layman."

Because of the conflict in the cases with respect to the growing use of summaries as evidenced by the instant use and the evident extension of their use in improper ways, petitioner urges that certiorari be granted and proper guidelines be established.

The words of two famous and eminent scholars ring through time and seem appropriate.

> "Justice has nothing to do with expediency. Justice has nothing to do with any temporary standard whatever. It is rooted and grounded in the fundamental instincts of humanity."
>
> Woodrow Wilson, Speech, Washington, 26 Feb. 1916, *The Home Book of Quotations,* p. 1028, Dodd Mead & Co., Ninth Printing.
>
> "Injustice often arises . . . over an over-subtle . . . construction of the law. . . ."
>
> Cicero, *The Home Book of Quotation,* p. 1032, Dodd Mead & Co., Ninth Printing.

It is not too pedantic or far fetched to consider, in our quest for a proper and just method of using summaries to consider the words of one of the greatest of all scholars who spoke of justice as follows:

> "Socrates. Why, my good sir, at the beginning of our enquiry, ages ago, there was justice tumbling out at our feet, and we never saw her; nothing could be more

ridiculous. Like people who go about looking for what they have in their hands—that was the way with us—we looked not at what we were seeking, but at what was far off in the distance; and therefore, I suppose, we missed her. . . ."

Plato, Republic, IV, 432B, *Great Treasury of Western Thought*, p. 861, R. R. Bowker Company, New York and London, 1977.

3. Trial Court As Advocate

Should a trial court in the presence of the jury interrupt cross-examination upon a relevant matter indicating the court's intention to sustain an objection if one is made? We think not.

At page 3 of the opinion of the court below, the court agrees that a question put to the witness Needham, Comptroller for the Laborers' International Union was relevant. The exchange which occurred is as follows:

> "By Mr. Wonnell (appellant's counsel)
>
> Q. Are you familiar with the procedure in some locals of giving a per diem without submission of an expense voucher or an expense account?
>
> The Court: I am going to sustain an objection to that.
>
> Mr. Palmer: The Government does so object, Your Honor.
>
> The Court: I will sustain the objection to that."

The court below reasons that since the trial court had established by questions by the court that Needham had no contact with determinations as to the reasonableness of payments of per diem, he was not competent to answer the question set out above. This is most difficult to understand since the question is designed specifically to determine his competency or familiarity with the subject of the inquiry. The witness could have answered "yes" or "no."

It was a critical point in the trial since petitioner had admitted no expense vouchers were submitted and that this had been the procedure and custom for as long as he and others could remember. If Needham was familiar with this custom and procedure, it would have gone far to corroborate lack of intent. At this sensitive and delicate point in the trial for the court to intervene as an advocate was prejudicial error.

It is quite easy for one to argue that since the jury acquitted the petitioner on six counts of the indictment, it is clear they were not misled and, therefore, were not prejudiced. There is a much more persuasive argument to the contrary. Petitioner was acquitted in those six points on his denials that he committed the act alleged. As to the charges under 29 U.S.C. 501(C) in question, Scales admitted the acts and insisted on absence of mens rea. The signal from the trial court is clear, before the jury, that either such corroboration as sought is inadmissible or not to be taken into account in any event.

Petitioner urges that the United States Supreme Court, both in review in accordance with the plain error doctrine and the supervisory powers in Rule 19, that lower courts should follow the prescription of conduct laid down in *United States* v. *Harris*, 501 F2d 1 (9th Cir. 1974), where when cross-examination was interrupted the Court held in syllabus 12:

> "Trial Court must be ever mindful of the sensitive role it plays in a jury trial and avoid even appearance of advocacy or partiality."

While the court below cites *United States* v. *Wright*, 542 F2d 975, 978-979, (7th Cir. 1976) cert. denied 429 U.S. 1073 (1977), in that case the trial judge was held not to become an advocate or litigant by stopping on his own motion direct or cross-examination when an improper line of inquiry is

being explored. How can *Wright* be authority here when the court below held the inquiry relevant?

To continue to condone such conduct is to invite it on a continuing basis.

CONCLUSION

For all of the reasons set forth herein, the petition for writ of certiorari should be allowed.

Respectfully submitted,

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APPENDIX A

No. 78-5322

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JOHN E. SCALES, *Defendant-Appellant.*	ON APPEAL from the Southern District of Ohio, Eastern Division.

Decided and Filed March 8, 1979.

Before LIVELY and KEITH, Circuit Judges, and TAYLOR,* District Judge.

TAYLOR, District Judge. John E. Scales has appealed his conviction on nine counts of unlawfully converting to his own use assets of Local 423 of the Laborer's International Union in violation of 29 U.S.C. § 501(c) and one count of conspiracy in violation of 18 U.S.C. § 371. He was acquitted on the six remaining counts, which included three charges under Section 501(c), two charges for conversion of funds from an employee insurance fund in violation of 18 U.S.C. § 664, and one charge of mail fraud in violation of 18 U.S.C. § 1341. He was given an aggregate sentence of ten years.

* The Honorable Robert L. Taylor, District Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

From 1968 through 1977, appellant was the business manager of Local 423 of the Laborer's International Union, a labor organization as that term is used in 29 U.S.C. § 401.531. Count I of the indictment charged him with conspiracy to embezzle and misapply the funds of Local 423 and the Ohio Laborer's District Council – Ohio Contractor's Association Insurance Fund. A number of overt acts were alleged in furtherance of the conspiracy including receiving double payments for expenses, receiving payment for expenses not incurred, using Local 423 funds for personal expenses of no benefit to the members of the Union and receiving interest free loans made for fraudulent purposes from union funds. All but one of the substantive counts upon which appellant was convicted were also charged as overt acts. Count XV involved similar self dealing with union funds.

At trial, the Government introduced 161 exhibits, consisting of thousands of pages of documents, and the testimony of eight co-conspirators who had previously pleaded guilty to conspiring with appellant to embezzle union funds. Seventeen other witnesses also testified, including FBI Agent Charles A. Tosi, who prepared Government's summary exhibit, Exhibit 145. The trial lasted eight days.

Appellant raises two questions on appeal: *One*, whether the trial judge erred prejudicially in interrupting the testimony of a Government witness on cross-examination and inviting the Government to object; and *Two*, whether the trial judge erred prejudicially in admitting Government Exhibit 145 and in admitting the testimony of Special Agent Tosi of the FBI in connection with said exhibit.

Testimony of Thomas Needham

Thomas Needham, Comptroller of the Laborer's International Union, testified on direct examination to the absence of official union business at various time and places in 1974-76, and also to the issuance of per diem expenses and payments for airfare from the International to appellant on the occasion

of the September 1976 International Union convention in Miami, Florida. On cross-examination, he was asked if he were familiar with the practice in some local unions of paying a per diem in addition to funds paid by the International. He replied that he did not have "first-hand knowledge" of such a practice. Over the Government's objection, he was nevertheless permitted to testify that it was his understanding that the International did permit such a practice, if payment were reasonable, and that some local unions did in fact supplement expenses payments from the International. At this point, the Court inquired further of the witness concerning his personal familiarity with the determination of the reasonableness of payments by the local unions. The witness answered that he had no contact with that determination. At this point, the following exchange occurred:

> By Mr. Wonnell [appellant's counsel]
>
> Q. Are you familiar with the procedure in some locals of giving a per diem without submission of an expense voucher or an expense account?
>
> The Court: I am going to sustain an objection to that.
>
> Mr. Palmer: The Government does so object, your Honor.
>
> The Court: I will sustain the objection to that.

Appellant claims that the Court committed error in sustaining the objection, and suggested bias against appellant by intervening before an objection was made by the Government.

Although the Court agrees with appellant that the question posed was relevant,[1] the trial judge committed no error in ruling that the witness could not answer the question at issue.

---

[1] The Government argues, inter alia, that the question posed was irrelevant to the crimes charged because appellant was charged with receiving double airfare rather than double per diem. The Court notes that Counts X and XIV included an allegation of double payment of expenses as well as double payment of airfare.

The witness had stated at the outset of cross-examination that he lacked personal knowledge of local union practices in regard to additional expense payments and was therefore not competent to answer the question.

Nor was there any error in the manner in which the trial judge sustained the Government's objection. A trial judge must not give an impression of partisanship on either side. *United States* v. *Ornstein*, 355 F.2d 222, 224 (6th Cir. 1966). That duty, however, does not require the trial judge to sit idly by while incompetent evidence is presented to the jury. *See United States* v. *Wright*, 542 F.2d 975, 978-979 (7th Cir. 1976), *cert. denied* 429 U.S. 1073 (1977).[2] The trial judge's action in this case did not contain any suggestion of bias against the appellant.

In addition to the foregoing, the court's action in inviting objection was particularly appropriate in this instance because the Government had objected moments earlier apparently on the basis of the witness' lack of personal knowledge of the subject matter. The court overruled the objection at that time. The trial judge may well have felt that the Government would not renew its objection in view of the court's earlier ruling. In such a case, a trial court would have to give some indication that an objection might be reconsidered before the Government could be expected to bring the matter up again.

Government Exhibit 145 and Related Testimony

Appellant contends that the trial judge erred in allowing Government Exhibit 145 to be admitted into evidence as well as in permitting Special Agent Charles Tosi to testify concerning the exhibit. Appellant argues that the exhibit was inadmissible and prejudicial because it summarized the in-

[2] *United States* v. *Wright*, 542 F.2d 975 (7th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977), was overruled by *United States* v. *Hollinger*, 553 F.2d 535 (7th Cir. 1977), on a different issue from that presented here.

dictment and part of the Government's proof, thereby constituting conclusion and argument, and that Agent Tosi's testimony contained improper conclusions and argument.

Exhibit 145 consisted of a series of large charts. The first chart summarized all the charges contained in the indictment. Each of the remaining charts summarized a count or an overt act, or both, by reproducing, or making reference to, some of the documentary proof already in evidence. The only references in Exhibit 145 that were not to documents admitted previously into evidence were several statements in the charts that union records did not contain certain information. The charts were authenticated by Agent Tosi.

There was no prejudicial error committed by the admission of Exhibit 145. In regard to the summary of the indictment, the rule is clear that the trial judge has discretion to submit the indictment to the jury in a criminal case as long as limiting instructions are given to the effect that the indictment is not to be considered as evidence of the guilt of the accused. *See Garner* v. *United States*, 244 F.2d 575 (6th Cir. 1957), *cert. denied*, 355 U.S. 832; *United States* v. *Russo*, 480 F.2d 1228, 1244 (6th Cir. 1973), *cert. denied*, 414 U.S. 1157 (1974). Such a charge was given in this case. Indeed, the actual indictment was submitted to the jury in this case, and appellant raises no objection in that regard.

Nor can appellant claim that he was prejudiced by this chart because it was a summary rather than a copy of the full indictment. Not only was the Government's summary not inflammatory or prejudicially worded, the summary contained only enough description of the charges to remind the jury of the substance of each count. The trial judge carefully charged the jury as to all of the elements necessary for conviction on each count. The summary of the indictment clearly was intended to aid the jury in organizing the proof and no rights of appellant were prejudiced by its admission into evidence. *Cf. United States* v. *Swan*, 396 F.2d 883, 886-887 (2nd Cir. 1968), *cert. denied*, 393 U.S. 923.

The remainder of Exhibit 145 consisted of a summary of some of the objective proof relating to a number of the counts and overt acts charged. The Government argues that the exhibit was admissible under Fed.R.Evid. 1006, which provides as follows:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at reasonable time and place. The court may order that they be produced in court.

Insofar as Exhibit 145 contained summaries of other exhibits in evidence, appellant contends that Rule 1006 does not apply because each document listed could have been, and was, examined at the time of its admission. There is no requirement in Rule 1006, however, that it be literally impossible to examine the underlying records before a summary or chart may be utilitzed. All that is required for the rule to apply is that the underlying "writings" be "voluminous" and that in-court examination not be convenient. With 161 exhibits, involving facts relevant to sixteen counts and twenty-one overt acts, comprehension of the exhibits would have been difficult, and certainly would have been inconvenient, without the charts utilized by the Government. *See United States* v. *Evans,* 572 F.2d 455 (5th Cir. 1978), *rehearing en banc denied,* 576 F.2d 931.

Exhibit 145 also contained written statements that union records did not contain certain information, primarily authorization for travel. Appellant argues that this information is not covered by Rule 1006 because this is information that records *do not* contain, and thus is not a summary of their contents as required by the rule.

Appellant admits that the underlying union records could have been introduced to prove the nonoccurrence of the relevant matters under Fed.R.Evid. 803(7). If the records

themselves could have been admitted to show what their contents did not include, there appears to be no reason why Rule 1006 would not apply to a summary of their contents. It is true that in such an instance the content of the records is negative, but that does not render the fact of omission any less an accurate summary of the content of the records. The Court is strengthened in this conclusion by the similar view of 4 Wigmore, Evidence § 1230 (Chadbourn rev. 1972):

> [T]estimony, by one who has examined records, that *no record* of a specific tenor is there contained is receivable instead of producing the entire mass for perusal in the courtroom.

(Emphasis in original)

It is to this section in Wigmore, though apparently to an earlier edition, that the Advisory Committee referred in its explanatory note for Rule 1006. *See Rules of Evidence,* 56 F.R.D. 183, 345-346 (1972) (Advisory Committee's Note); *cf. United States* v. *Smyth,* 556 F.2d 1179, 1183 n. 9 (5th Cir. 1977), *rehearing en banc denied,* 557 F.2d 823, *cert. denied,* 434 U.S. 862.

Of course even under Rule 1006, the summary or chart must be accurate, authentic and properly introduced before it may be admitted in evidence. *See United States* v. *Denton,* 556 F.2d 811, 816 (6th Cir. 1977), *cert. denied,* 434 U.S. 892. In this regard appellant urges in general terms that Exhibit 145 is replete with characterizations and conclusions, and is deceptive. After a careful examination of Exhibit 145, the Court is unable to find any misleading or conclusory references. Exhibit 145 appears to present merely an organization of some of the undisputed objective evidence in terms of the relevant counts of the indictment.

Appellant also complains that the charts were too large and that the authenticating testimony was insufficient because Agent Tosi was not an expert. Size alone does not render inadmissible an exhibit containing otherwise unobjectionable

objective evidence. *Cf. United States* v. *Nathan,* 536 F.2d 988, 992 n. 5 (2nd Cir. 1976), *cert. denied,* 429 U.S. 930. Given the nature of Exhibit 145, it is difficult to see how Agent Tosi's lack of expertise could have prejudiced appellant. The chart did not contain complicated calculations that would require an expert for accuracy. In order to authenticate Exhibit 145 it was necessary only that Agent Tosi had properly catalogued the exhibits previously admitted and had knowledge of the analysis of the union records referred to in the exhibit. Neither of these requirements necessitated any special expertise. As the one who supervised the compilation of Exhibit 145, Agent Tosi was the proper person to attest to the authenticity and accuracy of the chart. *See Weinstein's Evidence,* ¶ 1006[06].

Entirely aside from Rule 1006, there would still be ample authority for the admission of Exhibit 145 into evidence. There is an established tradition, both within this circut and in other circuits, that permits a summary of evidence to be put before the jury with proper limiting instructions. *See e.g., Gariepy* v. *United States,* 189 F.2d 459 (6th Cir. 1951); *Epstein* v. *United States,* 246 F.2d 563 (6th Cir. 1957), *cert. denied,* 355 U.S. 868; *Barber* v. *United States,* 271 F.2d 265 (6th Cir. 1959); *United States* v. *Bartone,* 400 F.2d 459 (6th Cir. 1968), *cert. denied,* 393 U.S. 1027 (1969); *United States* v. *Rath,* 406 F.2d 757 (6th Cir. 1969), *cert. denied,* 394 U.S. 920; *United States* v. *Lattus,* 512 F.2d 352 (6th Cir. 1975); *Carlson* v. *United States,* 187 F.2d 366 (10th Cir. 1951); *Gordon* v. *United States,* 438 F.2d 858 (5th Cir. 1971), *cert. denied,* 404 U.S. 828; *United States* v. *Downen,* 496 F.2d 314 (10th Cir. 1974), *cert. denied,* 419 U.S. 897; *United States* v. *Lawhon,* 499 F.2d 352 (5th Cir. 1974), *rehearing en banc denied,* 502 F.2d 1168, *cert. denied,* 419 U.S. 1121 (1975). These cases normally involve violation of income tax laws but there has never been any formal distinction between the use of summaries in that type of case and in other types of criminal cases. *Cf. United States* v. *Conlin,* 551 F.2d 534, 538 (2nd Cir. 1977), *cert. denied,* 434 U.S. 831, and *United States* v. *Jalbert,*

504 F.2d 892, 894 (1st Cir. 1974) (both citing *United States* v. *Gordon, supra,* a case involving misapplication of bank funds). Some cases allow the summary of purely testimonial evidence, *e.g., Epstein* v. *United States,* 246 F.2d at 570; *Barber* v. *United States, supra,* so strictly speaking, such summaries cannot be said to come within the requirements of Rule 1006. The purpose of the summaries in these cases is simply to aid the jury in its examination of the evidence already admitted. *See United States* v. *Downen, supra.* Authority for such summaries is not usually cited, but would certainly exist under Fed.R.Evid. 611(a). *See Weinstein's Evidence* ¶ 1006[03].

The danger of permitting presentation of a summary of some of the evidence in a criminal case is plain. The jury might rely upon the alleged facts in the summary as if these facts had already been proved, *cf. United States* v. *Moody,* 339 F.2d 161 (6th Cir. 1964), *cert. denied,* 386 U.S. 1003 (1967), or as a substitute for assessing the credibility of witnesses. *Cf. Steele* v. *United States,* 222 F.2d 628 (5th Cir. 1955), *cert. denied,* 355 U.S. 828 (1957), *rehearing denied,* 355 U.S. 875. This danger has led to the requirement of "guarding instructions" to the effect that the chart is not itself evidence but is only an aid in evaluating the evidence. *See Holland* v. *United States,* 348 U.S. 121, 128 (1954); *United States* v. *Bartone,* 400 F.2d at 461. Even with such instructions, a summary may still be considered as too conclusory or as emphasizing too much certain portions of the Government's case, or as presenting incompetent facts. *See United States* v. *Conlin, supra; United States* v. *Abbas,* 504 F.2d 123 (9th Cir. 1974), *cert. denied,* 421 U.S. 988 (1975); *Elder* v. *United States,* 213 F.2d 876 (5th Cir. 1954), *cert. denied,* 348 U.S. 901, *rehearing denied* 348 U.S. 922 (1955). Trial courts may take care that such unfair summaries are not presented to juries.

Despite the danger, however, most summaries are routinely admitted. See cases, *supra.* In fact, not only are the sum-

maries themselves admitted, but computations and evaluations are often permitted on the basis of such summaries. *E.g.*, *Epstein* v. *United States, supra.*

In contrast to such extensive use, this appeal presents a very limited utilization of an evidence summary. The facts of the case were complex. Thus the summary was likely to have been very helpful to the jury. The facts summarized were entirely objective, and, for all that appears from this appeal, uncontested. No issue of credibility was presented. The exhibit was in no sense conclusory, but stated the facts shown in a neutral way. The facts summarized did not even directly undermine appellant's theory of the case. Finally, the trial judge did instruct the jury as to the limited purpose that such a summary could serve.[3]

Appellant's final argument is that the trial court improperly permitted Agent Tosi to deliver a closing argument during his authentication of the summary. Ultimately the trial court accepted appellant's objection and limited Agent Tosi's testimony. Because Exhibit 145 was essentially a presentation of objective material which aided the jury in remembering portions of the evidence and sorting out the charges, there was really no need for Agent Tosi to restate the portions of the evidence contained in Exhibit 145. Under these circum-

[3] Appellant has not specifically raised the issue of permitting such a summary to go to the jury during deliberations. At is appears that Exhibit 145 did accompany the jury, appellant's objection to this course may be viewed as implicit. It is certainly not unsual for such demonstrative evidence to go to the jury. *See United States* v. *Downen, supra; United States* v. *Goichman*, 407 F.Supp. 980 (E.D. Pa. 1976), *aff'd* 547 F.2d 778. In most cases, however, once the summary is considered properly admitted, the issue of its going to the jury is not separately raised. It appears generally that when such summaries are kept from the jury, it is either because they were not properly offered into evidence, *cf. Gordon* v. *United States, supra,* or because the summary was considered unfair or unreliable for the reasons listed above. *See Steele* v. *United States, supra; cf. United States* v. *Abbas, supra.* For essentially the same reasons we rule that this exhibit was properly admitted, we conclude that no right of appellant was prejudiced by its submission to the jury.

stances, it would perhaps have been preferable had the trial judge ruled from the start of Agent Tosi's testimony that Exhibit 145 was essentially self-explanatory. The Court need not decide this issue, however, because the early portion of Agent Tosi's testimony consisted of an accurate recounting of certain objective evidence already before the jury. No rights of appellant could have been prejudiced by such a recital.

For the foregoing reasons, the judgment of the trial court is affirmed.

APPENDIX B

United States of America vs. JOHN E. SCALES

JUN 23 12 34 PM '78
U.S. DISTRICT COURT
SOUTHERN DIST. OHIO
EAST. DIV. COLUMBUS

Southern District of Ohio

DEFENDANT

DOCKET NO. Cr-2-78-11 (1)

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 6 DAY 23 YEAR 78

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Harold E. Wonnell (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY

FINDING & JUDGMENT

There being a finding/verdict of
[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY. as to Counts 1,5,6,7,8,9,10,11,14 & 15

Defendant has been convicted as charged of the offense(s) of did conspire to violate Title 29 United States Code, Section 501(a) and Title 18 United States Code, Section 664. In violation of Title 18 United States Code, Section 371. Count # 1; did embezzle, steal, unlawfully and willfully abstract and convert to his own use, moneys, funds, property and assets of a Labor Union. In violation of Title 18 United States Code, Sections 664 and 2. Counts 5,6,7,8,9,10,11,14 and 15.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Four (4) years on Count 1 of the Indictment.

It Is The Further Judgment of the Court that the defendant JOHN E. SCALES be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Four (4) years on Count 6 of the Indictment, such sentence imposed on Count 6 of the Indictment to run consecutive to the sentence imposed in Count 1 of the Indictment.

It Is The Further Judgment of the Court that the defendant JOHN E. SCALES be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Two (2) years on Count 8 of the Indictmen such sentence imposed on Count 8 of the Indictment to run consecutive to the sentence imposed on this Defendant on Count 6 of the Indictment

SPECIAL CONDITIONS OF PROBATION

It Is The Further Judgment of the Court that the defendant JOHN E. SCALES be and he is hereby committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment for a period of Four (4) years each on Counts 5,7,9,10, 11,14 and 15, such sentences imposed on Counts 5,7,9,10,11,14 and 15 to run concurrently with the sentence imposed upon this defendant on Count 1 of the Indictment.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

A True Copy of the Original
Filed 6-23-78
Attest: John D. Lyter, Clerk
By _____ Deputy

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

Joseph P. Kinneary

Date June 23, 1978